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1MALAYSIA DEVELOPMENT BHD v. DEUTSCHE BANK (MALAYSIA) BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAJA AHMAD MOHZANUDDIN SHAH JC
[CIVIL SUIT NO: WA-22NCVC-337-05-2021]
4 NOVEMBER 2022

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Abstract – *No matter how justified the circumstances of an unsuccessful plaintiff's attempt to serve a writ of summons on the defendant might be, the discretionary power of the court to extend the validity of the writ ends at the second-maximum limit. As a result of O. 6 r. 7(2) of the Rules of Court 2012, the court is not permitted to exercise its discretionary power to extend the writ for a third time.*

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CIVIL PROCEDURE: *Service – Foreign defendant – Service of writ of summons out of jurisdiction – Failure to serve writ of summons within original time frame – Application for third extension of validity of writ – Whether discretionary power of court to extend writ ended at second maximum limit – Rules of Court 2012, O. 6 r. 7(2)*

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The plaintiff, a strategic investment and development company owned and controlled by the Government of Malaysia through its Minister of Finance (Incorporated), filed this action against all seven defendants, seeking recovery, amongst others, of a sum of over USD1.1 billion that was alleged to have been obtained by improper means. It was further alleged that the

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defendants committed conspiracy, breach of fiduciary duties, breach of trustee duties, breach of common law duties, dishonest assistance and/or negligence towards the plaintiff. The court granted the plaintiff leave to serve the notice of the amended writ of summons out of the jurisdiction on the second to seventh defendants. The fourth, fifth and sixth defendants entered their appearance. As the plaintiff was unable to serve the notice of the

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amended writ of summons on the second, third and seventh defendants within the original time frame, the plaintiff applied for and obtained an order extending the validity of the amended writ of summons for six months beginning on 7 November 2021. As the second, third and seventh defendants were residing in different jurisdictions, namely Switzerland and United

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Kingdom, it was necessary to translate the relevant cause papers into the official languages of the countries where the service of process would be carried out. Translations were completed and the plaintiff filed at the Court's Registry Form 10 (request for service of document abroad), the notice of the amended writ of summons as well as other relevant cause papers and certified

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translations. A further extension of the validity of the amended writ of summons was granted by the court on 11 May 2022 as service out of the jurisdiction of the second, third and seventh defendants had yet to take place. Also, the notice of the amended writ of summons would need to be served

on the second and third defendants in Switzerland through diplomatic channels. The plaintiff forwarded the relevant cause papers to the 'Unit Sijil Amalan Guaman' (Practicing Certificates Unit) at the Registrar's office of the High Court of Malaya in order to facilitate the service of the notice of amended writ of summons on the second, third and seventh defendants. By way of encl. 146 which was filed *ex parte* by the plaintiff on a certificate of urgency, this court was urged to exercise its discretion in extending for the third time the validity of the amended writ of summons for another six months beginning from 7 November 2022. The plaintiff submitted, *inter alia*, that the validity of the amended writ of summons should be extended in the interest of justice.

Held (dismissing encl. 146):

(1) In accordance with O. 6 r. 7(2) of the Rules of Court 2012 ('ROC'), a court may extend the validity of a writ twice (three times in Sabah and Sarawak and five times in admiralty actions) but not for more than six months at a time. As the plaintiff had been unable to serve the writ on foreign defendants for the past 18 months, a third extension of the writ was then requested by the plaintiff. In terms of procedure, it was not permissible for this court to grant a third extension at its discretion. This view was further strengthened by the opinion of the Court of Appeal in *Khoo Kim Hock v. Mayban Finance* ('*Khoo*') which held that the court could extend the validity of the writ only twice under O. 6 r. 7(2). (paras 19 & 22)

(2) Despite the fact that the plaintiff had met the necessary prerequisites for the first stage outlined in O. 6 r. 7(2A) of the ROC, the plaintiff had nonetheless been unable to pass the main hurdle for the second stage set forth in O. 6 r. 7(2). As a result of O. 6 r. 7(2) of the ROC, this court was not permitted to exercise its discretionary power to extend the writ beyond two times. This court was not only bound by *stare decisis* to uphold the opinion of the appellate judges regarding this issue as a result of the decision in *Khoo,* but there were no other provisions of the law that would allow this court to circumvent the requirement under O. 6 r. 7(2) by extending the validity of the writ beyond the two-time limit. Thus, no matter how justified the circumstances of an unsuccessful plaintiff's attempt to serve a writ might be, the discretionary power of the court to extend the writ ended at the second maximum limit. There was simply no room for discretion here. (para 23)

Case(s) referred to:

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

FIMBank Plc v. The Owners And/Or Demise Charterers Of The Ship Or Vessel "NIKA" Now Known As "Bao Lai" [2022] 8 CLJ 324 HC ***(refd)***

Khoo Kim Hock v. Mayban Finance Bhd [2011] 4 CLJ 250 CA ***(refd)***

South Johor Securities Sdn Bhd v. Alexander Codsi [2007] 9 CLJ 145 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 6 r. 7(2), (2A)
Rules of the High Court 1980, O. 6 r. 7(2), (2A)

For the plaintiff - Kong Xin Qing; M/s Rosli Dahlan Saravana Partnership

Reported by Suhainah Wahiduddin

JUDGMENT
(encl. 146)

Raja Ahmad Mohzanuddin Shah JC:

Preliminary

[1] As a preliminary remark, by way of encl. 146 which was filed *ex parte* by the plaintiff on a certificate of urgency, I was urged to exercise my discretion in extending for the third time the validity of the amended writ of summons dated 7 May 2021 for another six months beginning from 7 November 2022.

[2] After hearing the plaintiff, I dismissed encl. 146 without an order on costs since my ability to exercise such discretion is limited by O. 6 r. 7(2) of the Rules of Court 2012 ("Rules"). As a result of my decision, the plaintiff has appealed. I am now providing my grounds for dismissing encl. 146.

History Of The Proceedings

[3] The plaintiff, popularly known as 1MDB, is a strategic investment and development company owned and controlled by the Government of Malaysia through its Minister of Finance (Incorporated). On 7 May 2021, 1MDB filed this action against all seven defendants seeking recovery, amongst others, of a sum of over USD1.11 billion that is alleged to have been obtained by improper means. It is further alleged that the defendants committed conspiracy, breach of fiduciary duties, breach of trustee duties, breach of common law duties, dishonest assistance and/or negligence towards the plaintiff.

[4] On 15 October 2021, this court granted the plaintiff's solicitors leave to serve the notice of amended writ of summons out of the jurisdiction on the second to seventh defendants. On 2 November 2021, the fourth, fifth and sixth defendants entered their appearance.

[5] As the plaintiff was unable to serve the notice of amended writ of summons on the second, third and seventh defendants within the original timeframe, the plaintiff applied for and obtained an order dated 2 November 2021 extending the validity of the amended writ of summons for six months beginning on 7 November 2021.

[6] Additionally, I was informed that as the second, third and seventh defendants were residing in different jurisdictions, namely Switzerland and the United Kingdom, the process of serving the cause papers out of the jurisdiction was somewhat complex. It was necessary to translate the relevant cause papers into the official languages of the countries where the service of process would be carried out. Due to the fact that the second and third defendants were both residing in Zurich and Geneva respectively, the cause papers were also translated into German and French which are both Swiss national languages.

[7] Translations were completed on 1 April 2022. On 26 April 2022, the plaintiff filed at the Court's Registry Form 10 (request for service of document abroad), the notice of amended writ of summons as well as other relevant cause papers and certified translations.

[8] A further extension of the validity of the amended writ of summons was granted by this court on 11 May 2022 as service out of the jurisdiction of the second, third and seventh defendants had yet to take place.

[9] Also, it was explained to me that the notice of the amended writ of summons would need to be served on the second and third defendants in Switzerland through diplomatic channels. It was at this point that on 14 June 2022, the plaintiff's solicitors forwarded the relevant cause papers to the 'unit sijil amalan guaman' (practicing certificates unit) of the Registrar's Office of the High Court of Malaya in order to facilitate the service of the notice of amended writ of summons on the second, third and seventh defendants. At this juncture, it is of significance to note that the practicing certificates unit also assists with the service of documents out of the jurisdiction.

[10] According to the plaintiff's solicitors, they continued to follow up with the practicing certificates unit consistently on the status of service out of the jurisdiction involving the defendants. A notification was then provided to the plaintiff's solicitors that it would take at least four months for the process of service to be completed and delivered to both the foreign governments and the defendants. However, this would depend upon the procedures followed in the relevant jurisdictions.

[11] The practicing certificates unit further notified the plaintiff's solicitors that it had contacted the relevant Government agencies regarding the process of service on the second and third defendants. According to the Malaysian Consular in Berne, the relevant documents were received on 29 September 2022 and that they had been forwarded to the appropriate Swiss authorities. As for the seventh defendant, the relevant documents were received by the High Commissioner of Malaysia in London on 8 August 2022. On 15 August 2022, they were mailed to the address of the seventh defendant. As of the date of filing of encl. 146, the documents had not been returned and it is

presumed that they had been properly received by the seventh defendant. At the time of filing encl. 146, the plaintiff was awaiting confirmation and proof of service from the practicing certificates unit.

The Plaintiff's Submission

[12] As part of his attempt to persuade me, the plaintiff's counsel argued that the validity of the amended writ of summons should be extended in the interest of justice. According to the plaintiff, it has good grounds to support its request for an extension of the validity of the amended writ of summons since reasonable efforts were made to serve the second, third and seventh defendants. Over and above that, the plaintiff argued that there has always been a genuine intent on the part of the plaintiff to pursue this case and therefore, the extension of the validity of the amended writ of summons was necessary in order to serve the cause papers on the remaining unserved defendants. Moreover, the validity of the amended writ of summons should be extended since the process of service was merely awaiting execution by the authorities and beyond the plaintiff's control.

[13] The plaintiff's learned counsel relied on *South Johor Securities Sdn Bhd v. Alexander Codsi* [2007] 9 CLJ 145; [2007] 8 MLJ 572 as a basis to support encl. 146. It has been suggested by learned counsel that the decision to grant this application was within my absolute discretion on the basis of the principles applied in *South Johor Securities Sdn Bhd* (*supra*). In *South Johor Securities Sdn Bhd* (*supra*), Kang Hwee Gee J (as His Lordship then was) dealt with an appeal brought by the plaintiff at the High Court against the ruling of the Senior Assistant Registrar who allowed the foreign defendant's application to set aside the writ of summons served on the defendant in the United Kingdom. The setting aside application was based on a number of grounds, including the fact that the writ of summons had been wrongly extended seven times. This deprived the defendant of the right to plead limitation. The defendant further alleged that the court had already informed the plaintiff in October 2003 that it would not extend the deadline further. In allowing the appeal, His Lordship said at p. 155 (CLJ); pp. 581 to 582 (MLJ):

> [16] The First Issue: Whether The Writ Ought Not To Be Extended
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> [18] The amended O. 6 r. 7(2) which provides that a writ may be extended twice does not prohibit the registrar from extending the writ more than twice where the justice of the case requires. By the use of the word 'may' it is clear to me that the amendment was intended to provide some restrictions on the registrar's discretion, but not to the extent of fettering him where circumstances justify, to order extensions more than twice. Had it been the object of the Rule to prohibit the extension of a writ more than twice, it would so provide for it in clear and absolute terms.

[19] The defendant was not within jurisdiction and the affidavits supporting the application for extensions clearly show that attempts were being made to serve the writ through the good office of the Federal Court Registry for onward transmission to the Chancery Department of the High Court in England through Wisma Putra and as for the last (seventh) extension, the affidavit in support had alleged on credible grounds that the defendant had been evading service.

[20] It is true that a writ should not generally be allowed to be extended where to do so would deprive the defendant of the defence of the action being time barred, but it was generally meant to apply to those cases where the plaintiff had sat on his right to commence an action against a defendant who could be served with the writ. It was not meant to fetter the discretion of the Registrar to grant the extension where, as in this case, the defendant was residing outside the jurisdiction and difficulties were encountered in the plaintiff's attempt to serve the notice of the writ and there was evidence that he was evading service. To refuse extension in such a case would allow the defendant to stay out of jurisdiction and take advantage of the statute of limitation to avoid the plaintiff's claim without a trial – an obvious injustice to the plaintiff.

[14] My attention was also drawn to the case of *FIMBank Plc v. The Owners And/Or Demise Charterers Of The Ship Or Vessel "NIKA" Now Known As "Bao Lai"* [2022] 8 CLJ 324; [2022] MLJU 1352 in which learned counsel for the plaintiff urged me to depart from Azlan Sulaiman JC's decision in that case and instead apply the principles laid down in *South Johor Securities Sdn Bhd* (*supra*). According to learned counsel, *FIMBank Plc* (*supra*) involved the validity of a writ in an admiralty action pursuant to O. 6 r. 7(2) of the Rules, therefore, it was distinct from this present case and should not be followed by this court.

[15] A final attempt to persuade me was made by learned counsel when he informed me that in a separate case involving the same plaintiff in another High Court, the plaintiff had been permitted to extend the validity of the writ for the third time. It was suggested to me that I would find this persuasive. With all due respect to the learned counsel, I made my decision based on the facts before me and according to my understanding of the law at the time.

The Applicable Legal Principles

[16] Order 6 r. 7 of the Rules must be examined prior to proceeding with encl. 146. This provision is reproduced in its entirety below:

Duration and renewal of writ (O. 6 r. 7)

7. (1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for six months beginning from the date of its issue, and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

(2) Subject to paragraph (2A), where efforts to serve a writ on a defendant have been unsuccessful, the Court may by order extend the validity of the writ twice (in Sabah and Sarawak thrice and in admiralty actions five times), not exceeding six months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.

(2A) An application for a renewal of writ must be made before the expiry of the writ, *ex parte* by notice of application supported by affidavit showing that efforts have been made to serve the defendant within one month from the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

(3) Before a writ, the validity of which has been extended under this rule, is served, it shall be marked with an official stamp in Form 3 showing the period for which the validity of the writ has been so extended.

(4) Where the validity of a writ is extended by order made under this rule, the order shall operate in relation to any other writ (whether original or concurrent) issued in the same action which has not been served, so as to extend the validity of that other writ until the expiration of the period specified in the order.

(5) A note of the renewal shall be entered in the cause book.

[17] There are two stages to the process of renewing a writ. First, the plaintiff must demonstrate that it has complied with the three prerequisites specifically outlined in O. 6 r. 7(2A) of the Rules and simplified by the Federal Court in *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329; [2009] 4 MLJ 149. Speaking on behalf of the Federal Court, Zaki Azmi CJ stated at p. 337 (CLJ); p. 156 (MLJ):

> [15] A writ issued in the first instance is valid for only six months. Thereafter, r. 7(2) of the RHC confers a discretionary power on the court to extend the validity of the writ and such discretion is to be exercised subject to r. 7(2A) of the RHC. There are three prerequisites under r. 7(2A) of the RHC which an applicant for renewal of a writ must prove. They are that it must:
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> (a) be made before the expiry of the writ;
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> (b) be made *ex parte* by summons;
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> (c) be supported by an affidavit identifying two salient points which are:
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> (i) that efforts have been made to serve the defendant within one month of the date of the issue of the writ; and
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> (ii) such efforts have been made subsequent thereto to effect service.

[18] In light of the factual circumstances provided by the plaintiff and discussed earlier in this judgment, the plaintiff seemed to have satisfied the three prerequisites under O. 6 r. 7(2A) of the Rules. The next step in the process involved my examination of whether I was in a position to exercise my discretionary power to extend the writ for a third time following the plaintiff's satisfaction of the three prerequisites.

[19] In accordance with O. 6 r. 7(2) of the Rules, a court may extend the validity of a writ twice (three times in Sabah and Sarawak and five times in admiralty actions), but not for more than six months at a time. As the plaintiff has been unable to serve the writ on foreign defendants for the past 18 months, a third extension of the writ was then requested by the plaintiff. In terms of procedure, was it permissible for me to grant a third extension at my discretion?

[20] The only feasible answer to this question at the time was to refer to Azlan Sulaiman JC's judgment in *FIMBank Plc* (*supra*). In *FIMBank Plc* (*supra*), His Lordship, after thoroughly analysing the relevant authorities and the intent of the Rules Committee when it established a five-time limit for extending a writ *in rem*, decided not to grant a sixth extension despite the existence of sufficient grounds for extending the writ. According to the judgment of His Lordship, the following was observed:

> [33] Secondly, the renewal of a writ is only needed if service is not effected during its validity. That is evident from the words in Order 6 rule 7(2). Thus, the purpose of this rule is exact, and is only for renewing the validity of writs that have yet to served.
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> [34] Prior to 21 September 2000, the equivalent Order 6 rule 7(2) of the Rules of Court, 1980 did not specify any limit to the number of times a writ could be renewed. It only provided that "the Court may by order extend the validity of the writ from time to time for such period not exceeding 12 months at any one time." Theoretically, a writ could be renewed over and over and over again as long as cogent explanation were repeatedly provided explaining why it had not been served.
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> [35] Amendments to the Rules are made by the Rules Committee, which is headed by the Chief Justice and consists of carefully selected members of the Bench and the Bar, as well as the Attorney General or his representative. It is they who had deliberated and decided that Order 6 rule 7(2) Rules of Court, 1980 should be amended:
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> (i) by reducing the life-span of a writ at first instance from 12 months to six months;
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> (ii) by limiting the number of times a writ could be extended *ie*, twice in Peninsular Malaysia, thrice in Sabah & Sarawak, and five times in admiralty actions; and
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> (iii) by mandating that the application for extension must be made before the expiry of the writ.

A [36] That amendment came about by PU(A) 342/2000 and took effect from 21 September 2000.

[37] When the Rules of Court, 2012 replaced the Rules of the High Court, 1980, the amended Order 6 rule 7(2) Rules of Court, 1980 was accepted *in toto*.

B [38] It is clear from PU(A) 342/2000 that in 2000 the Rules Committee of the time recognised the need to fix a number of times a writ could be extended. It permitted only two extensions for ordinary writs in Peninsular Malaysia and at the same time acknowledged that a writ in Sabah and Sarawak should (perhaps for geographical considerations) be allowed to be extended three times. It also decided that writs in admiralty C actions should be allowed more extensions than the ordinary writ, but up to five. For the latter, it can be reasonably assumed that this was because the Rules Committee acknowledged the fact that a writ *in rem* had to be served on the vessel concerned as and when it happened to be in Malaysian waters and thus service was not necessarily within the D Plaintiff's control. Nevertheless, the Rules Committee still thought it necessary to put a cap on the number of extensions that could be made.

[21] Despite the fact that *FIMBank Plc* (*supra*) dealt with the time limit for an extension of a writ *in rem*, there was no exception to this principle in the case at hand. Therefore, I did not see a need to divert my findings in a E different direction.

[22] My view has been further strengthened by the opinion of the Court of Appeal in *Khoo Kim Hock v. Mayban Finance Bhd* [2011] 4 CLJ 250 which held that the court could extend the validity of the writ only twice under O. 6 r. 7(2) of the Rules of the High Court 1980. Order 6 r. 7(2) of the Rules F of the High Court 1980 corresponds to the same provision in the Rules of Court 2012. At p. 260 of the law report, Sulong Matjeraie JCA (as His Lordship then was) delivered the following judgment in *Khoo Kim Hock* (*supra*) at p. 260:

[27] The validity of the writ could only be extended twice under the Rules G of the High Court 1980. By those words, the court could not extend beyond two times. However unfettered might be its powers or however deliberate and considered the discretion might have been exercised, the High Court Johor Bahru had no valid authority to extend as it did the writ by 11 times spanning over a period of five years and six months. This was simply contrary to O. 6 r. 7(2) of the Rules of the High Court 1980.

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[23] Returning to the issue that I have considered, despite the fact that the plaintiff has met the necessary prerequisites for the first stage outlined in O. 6 r. 7(2A) of the Rules, the plaintiff has nonetheless been unable to pass the main hurdle for the second stage set forth in O. 6 r. 7(2) of the Rules. In other words, as a result of O. 6 r. 7(2) of the Rules, I was not permitted I to exercise my discretionary power to extend the writ beyond two times. I was bound not only by *stare decisis* to uphold the opinion of the appellate

judges regarding this issue as a result of the decision in *Khoo Kim Hock* (*supra*) but there were no other provisions of the law that would allow me to circumvent the requirement under O. 6 r. 7(2) of the Rules by extending the validity of the writ beyond the two-time limit. Thus, no matter how justified the circumstances of an unsuccessful plaintiff's attempt to serve a writ might be, the discretionary power of the court to extend the writ ends at the second maximum limit. There was simply no room for discretion here.

[24] In light of the above, encl. 146 has been dismissed with no order as to costs.